LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
NOV 11 1971

In The

Supreme Court of the United States

October Term, 1971

No. 71-6471

JAMES E. SIMON CO., INC., Petitioner

v.

ARDELT-HORN CONSTRUCTION CO. and ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RICHARD W. SMITH
ALLEN L. OVERCASH
Woods, Aitken, Smith, Greer,
Overcash & Spangler
1241 N Street
Lincoln, Nebraska 68508
Attorneys for Petitioner

JOE CHRISTENSEN, INC., 1540 Adams, Lincoln, Nebraska

INDEX

Subject Index

Page

Opinions Below 1
Jurisdiction 2
Questions Presented 2
Statutes Involved 2
Statement of the Case 2
Reasons For Granting the Writ 4
Reason No. 1: The opinions below raised, and erroneously decided, an important and recurring federal question of the effect of the Miller Act upon the rights of laborers and materialmen on government construction projects 4
Reason No. 2: The opinions below raise important issues of conflict with this Court's decisions in *Pearlman* 9
A. The opinions below raise important and unsettled questions concerning the nature of the rights of laborers and materialmen announced in *Pearlman* .. 9
B. The opinions below conflict with the *Pearlman* decision in their limitation of that decision to cases brought by sureties against withheld funds 13
Conclusion 16
Appendix A: Opinion and Judgment of Eighth Circuit Court of Appeals A:1
Appendix B: Opinion and Judgment of United States District Court for the District of Nebraska A:4
Appendix C: The Miller Act, 40 U.S.C. § 270 a-d A:22

Table of Authorities Cited

Cases Cited

Argonaut Insurance Company v. United States, 434 F.2d 1362 (Ct. Cl. 1970) 14
Continental Casualty Co. v. United States, 169 F. Supp. 945 (Ct. Cl. 1959) 12
Fireman's Fund Insurance Company v. United States, 421 F.2d 706 (Ct. Cl. 1970) 13
Framingham Trust Co. v. Gould-National Batteries, Inc., 427 F.2d 856 (1st Cir. 1970) 13

Page

Henningsen v. United States Fidelity and Guaranty Co., 208 U.S. 404 (1907) 7, 12
MacEvoy Co. v. United States, 322 U.S. 102 (1944) 5
Martin v. National Surety Company, 300 U.S. 588 (1937) 3, 13
Mestayer Lumber Company, Inc. v. Cusock, 141 So. 2d 166 (La. App. 1962) 14
National Surety Co. v. United States, 132 Ct. Cl. 724, 133 F. Supp. 381 (1955) 12
Pearlman v. Reliance Insurance Company, 371 U.S. 132 (1962) 2, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15
Prairie State National Bank v. United States, 164 U.S. 226 (1896) 7, 11, 12, 14, 15
Royal Indemnity Co. v. United States, 93 F. Supp. 891 (Ct. Cl. 1950) 12
Sun Insurance Co. of New York v. Diversified Engineers, Inc., 240 F. Supp. 606 (Mont. 1965) 6
United States v. Kalady Construction Company, 227 F. Supp. 1017 (Ill. 1964) 6
United States v. Munsey Trust Co., 332 U.S. 234 (1947) 5, 9
United States v. Raley Contracting Company, 210 F. Supp. 54 (N.D. Miss. 1962) 14

Statutes Cited

The Heard Act, Act of August 13, 1894, Ch. 280, 28 Stat. 278, as amended by Act of February 24, 1905, Ch. 778, 33 Stat. 11 5
The Miller Act, 40 U.S.C. §§ 270 a-d (1935) 2, 6
28 U.S.C. § 1254(1) (1948) 2

Texts and Miscellaneous Authorities Cited

4 CCH, Gov't. Cont. Rep. Par. 35,267.25 (1971) 8
Restatement of Law of Restitution, § 162 (1936) 15
McManus, Richard P., "The Miller Act Performance Bond —An Additional Payment Bond?" 550 *Ins. L.J.* 875 (November 1968) 6
79 Cong. Rec. 11,702 (1935) 5
79 Cong. Rec. 13,382 (1935) 5
Comment, "Reconsideration of Subrogative Rights of the Miller Act Payment Bond Surety" 71 *Yale L.J.* 1274 (1962) 12, 13

Page

Annot., 24 A.L.R. 1502 (1923) ____ 11
Annot., 32 A.L.R. 846 (1924) ____ 11
Annot., 77 A.L.R. 21 (1932) ____ 6
Annot., 118 A.L.R. 74 (1939) ____ 6

In The

Supreme Court of the United States

October Term, 1971

No. ———

JAMES E. SIMON CO., INC., Petitioner

v.

ARDELT-HORN CONSTRUCTION CO. and ST. PAUL FIRE & MARINE INSURANCE COMPANY, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner respectively prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered on August 17, 1971.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, not yet reported appears as Appendix A hereto. The Eighth Circuit opinion affirmed *per curiam* the judgment of the United States District Court for the District of Nebraska which judgment and opinion is reported in 316 F. Supp. 254 and appears as Appendix B hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on August 17, 1971 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Are *unpaid* laborers and materialmen who performed work on federal construction projects denied any right against the performance bond of the prime contractor and its surety even though the Miller Act payment bond is exhausted?

2. Did Congress by the passage of the Miller Act destroy the equitable rights of laborers and materialmen who worked on federal construction projects to be paid for their work?

3. Did not this Court hold in the case of *Pearlman v. Reliance Insurance Company*, 371 U. S. 132 (1962) that unpaid laborers and materialmen who work on federal construction projects are subrogated to the government's contractual right to enforce the promise of the prime contractor and his surety to pay for their work?

4. Are the principles announced by this Court in the *Pearlman* case only to be applied to favor sureties in cases involving funds withheld by the government?

STATUTES INVOLVED

The Miller Act, 40 U.S.C. § 270 a-d appears as Appendix C hereto.

STATEMENT OF THE CASE

The Respondent Ardelt-Horn Construction Co. ("Ardelt-Horn") as the prime contractor agreed with the U. S. government to construct paving at a U. S. Army ammunition plant. The Respondent Ardelt-Horn, together with the Respondent surety, St. Paul Fire & Marine Insurance Company ("St. Paul"), delivered a performance bond guaranteeing per-

formance of all the contractual obligations of Ardelt-Horn to the government. The performance bond was equal in its principal amount to the total contract price of the project.

One of Respondents' contractual obligations was to furnish a payment bond to the government. Respondents furnished a payment bond which was according to the Miller Act equal in principal amount to one-half of the contract price of the project. Since the payment bond is part of Respondents' construction contract with the government, Respondents by furnishing the payment bond became obligated under their construction contract with the government to pay for the labor and materials furnished to the project,[1] which obligation is guaranteed by the performance bond.

The Petitioner James E. Simon Co., Inc., ("Simon") as a subcontractor agreed with Ardelt-Horn to perform much of the work on the project. Petitioner Simon furnished substantial labor and material which was incorporated into the work which was accepted by the government and is being used by the government today. Even though Petitioner's work was acceptable in every respect, Petitioner has not been paid in full for its work and will not be paid unless this Court reviews and reverses the decision of the Eighth Circuit in this case.

The claims of Petitioner and others who furnished labor and material to the project exceeded the principal amount of the payment bond. Therefore, in order to obtain compensation for its work, Petitioner instituted this action against Respondents' performance bond seeking to enforce the promise which Respondents made to the government to pay for the work. Having performed much of the work on the project, and being unpaid, Petitioner asserts it is entitled to be equitably subrogated to the government's right to require Respondents to pay Petitioner.

The District Court sustained a motion to dismiss Petitioner's complaint for failure to state a claim upon which relief could

---

[1] Martin v. National Surety Company, 300 U. S. 588 (1937).

be granted and the Eighth Circuit affirmed. Both Courts held that Petitioner's security rights are limited solely to a mere prorata share of the insufficient proceeds of the payment bond. Petitioner was barred from participating in Respondents' performance bond and denied a right of action thereon.

If the opinions below are allowed to stand, Petitioner will have paid and discharged Respondents' obligation to perform and pay for the work, yet Petitioner will be denied compensation from Respondents therefor. Clearly, the holdings below will result in unjust enrichment to Respondents whose obligations to the government have been relieved by Petitioner. Since Petitioner discharged in large part Respondents' liability to the government under their performance bond, Petitioner claims under well established equitable principles the right to be subrogated to the government's remedies against such bond. Because the government has the right to require Respondents to pay laborers and materialmen including Petitioner and since the government has received the benefit of Petitioner's performance, Petitioner claims it is entitled by subrogation to enforce the government's rights against Respondents' performance bond.

REASONS FOR GRANTING THE WRIT

The opinions below raise and erroneously decide important federal questions vitally affecting all government construction work and concerning the effect of Congress' passage of the Miller Act and this Court's decision in the case of *Pearlman v. Reliance Insurance Company*, 371 U. S. 132 (1962).

Reason No. 1

The Opinions Below Raised and Erroneously Decided an Important and Recurring Federal Question of the Effect of the Miller Act Upon the Rights of Laborers and Materialmen on Government Construction Projects.

The opinions below held that the security rights of unpaid laborers and materialmen on government construction proj-

ects are limited to their share of the proceeds of the Miller Act payment bond regardless of the insufficiency of such proceeds. The Circuit Court stated:

> Congress has met any moral obligation to the providers of labor and material by providing the payment bond. A payment bond of $206,502.50 has been provided as required by the Miller Act. (A2)

Therefore, the Courts below held no unpaid laborer or materialman could sue for recovery on the Miller Act performance bond. Since unpaid laborers and materialmen cannot sue or lien the government,[2] they have no rights whatsoever, if the opinions below stand, other than to claim their share of the insufficient Miller Act payment bond. Neither the history of the Miller Act nor its terms support the proposition that it was intended to so limit the security of persons who perform work for the government.

The history of the passage of the Miller Act by Congress shows that the clear and only motivation of the Act was to strengthen the security rights of unpaid laborers and materialmen.[3] This Court has recognized the importance of this history and applied a liberal construction of the Miller Act in view of its highly remedial nature and in order to protect those whose labor and materials go into federal projects.[4]

---

[2] United States v. Munsey Trust Co., 332 U. S. 234 (1947).

[3] *See* 79 Cong. Rec. 11,702 and 79 Cong. Rec. 13,382. The Miller Act's predecessor, the Heard Act (28 Stat. 278, as amended 33 Stat. 811) provided for a single bond in which laborers and materialmen shared but only after any claims by the government were first paid. The Miller Act added a provision for a separate payment bond.

[4] MacEvoy Co. v. United States, 322 U. S. 102 at 105, 106 (1944). The history of the passage of the Miller Act was reviewed by this Court in detail in MacEvoy in which this Court concluded:

> The Miller Act, while it repealed the Heard Act, reinstated its basic provisions and was designed primarily to eliminate certain procedural limitations on its beneficiaries. *There was no expressed purpose in the legislative history to restrict in any*

Nothing in the terms of the Miller Act indicates that the payment bond it provided in one-half or less of contract price of the project[5] was to become the sole and exclusive remedy for unpaid laborers and materialmen. Neither did the Miller Act prescribe that no one other than the United States could sue for recovery on the performance bond required by the Act.[6]

The opinions below are consistent with the holding of a federal district court in another circuit[7] but contrary to the holding of another federal district court decision,[8] in still another circuit. The opinions below are contrary to this Court's decision in *Pearlman*. In *Pearlman* this Court faced

---

way the coverage of the Heard Act; the intent rather was to remove the procedural difficulties found to exist under the earlier measure and thereby make it easier for unpaid creditors to realize the benefits of the bond (Emphasis supplied).

[5] 40 U.S.C. § 270a(a)(2) provides that the payment bond shall equal one-half of any government contract of $1,000,000 or less and shall be equal to 40% of any larger contract. 40 U.S.C. § 270a(b) permits the contracting officer to waive the payment bond under certain circumstances.

[6] The drafters of the Miller Act did not prescribe an "indemnity" bond but instead a "performance" bond. Yet such "indemnity" type bonds, guaranteeing only against actual loss by the named obligee had been used for many years where the intention of the bond was to prevent labor and material claimants from suing on it. *See*, Annos. 77 A.L.R. 21, and 118 A.L.R. 74. The reason is obvious from the history of the adoption by Congress of the Miller Act—as one writer put it: ". . . [A]ssuredly, Congress was not concerned with the welfare of sureties in adopting the Miller Act." ("The Miller Act Performance Bond—An Additional Payment Bond?" by Richard P. McManus, 550 Insurance Law Journal, November, 1968, p. 875 at p. 881)

[7] Sun Insurance Co. of New York v. Diversified Engineers, Inc., 240 F. Supp. 606 (Mont. 1965).

[8] The Illinois District Court in the case of United States v. Kalady Construction Company, 227 F. Supp. 1017 (1964) upheld the right of unpaid laborers to recover on the prime contractor's performance bond furnished under the Miller Act.

the same issue as occurs in this case: Did the passage by Congress of the Miller Act with its provision for a separate payment bond change the remedies of equitable subrogation which had existed before that Act?[9] This Court in *Pearlman* held that neither the "slight" difference between the Heard Act and the Miller Act nor the legislative history of the Miller Act indicated a purpose to make such a change.[10] It is submitted that the opinions below holding that no such rights of equitable subrogation can be asserted by Petitioner because the Miller Act provided a separate payment bond are contrary to the principle of this Court's holding in *Pearlman*.

---

[9] Prior to the passage of the Miller Act, this Court held in the case of Prairie State National Bank v. United States, 164 U. S. 226 (1896) that a surety who had performed a government contract for the prime contractor would be equitably subrogated to the rights of the government and thereby recover the contract proceeds. In the case of Henningsen v. United States Fidelity and Guaranty Co., 208 U. S. 404 (1907) this Court held that a surety who paid laborers and materialmen could assert similar equitable rights of subrogation.

[10] This Court stated:

> It is argued that the Miller Act changed the law as declared in the Prairie State and Henningsen Cases. We think not. Certainly no language of the Act does, and we have been pointed to no legislative history that indicates such a purpose. The suggestion is, however, that a congressional purpose to repudiate the equitable doctrine of the two cases should be implied from the fact that the Miller Act required a public contract surety to execute two bonds instead of the one formerly required. It is true that the Miller Act did require both a performance bond and an additional payment bond, that is, one to assure completion of the contract and one to assure payments by the contractor for materials and labor. But the prior Acts on this subject, while requiring only one bond, made it cover both performance and payment. Neither this slight difference in the new and the old Acts nor any other argument presented persuades us that Congress in passing the Miller Act intended to repudiate equitable principles so deeply imbedded in our commercial practices, our economy, and our law as those spelled out in the Prairie Bank and Henningsen Cases. (371 U. S. at 139, 140)

The opinions below are of immense importance to every single construction project of the United States government and every person furnishing labor or material to such project. The opinions below mean that the sole and only security such persons can depend upon is their share of the Miller Act payment bond provided for the project. The total potential claims of laborers and materialmen will normally exceed the amount of the payment bond.[11] Any person proposing to furnish labor or material to a government construction project must, if the opinions below are allowed to stand, accept the fact that his security rights are less than his potential claims. This is in contrast to his mechanics lien security on private projects which normally is equal to his potential claims. The result will become higher bid prices to the federal government, or fewer bidders, or both, which will cause substantially more expense to the federal taxpayer.

If allowed to stand, the opinions below will also have a serious impact upon the progress and completion of government construction projects. If a laborer or materialman is unpaid during the work, what can he do? He has no way of knowing whether his risking additional labor or material will result in any payment to him or not.[12] The only practical

---

[11] Quite commonly, as in the case at bar, the prime contractor on a government construction project will subcontract more than a majority of the project. For defense contracts Section 18-104 of the Armed Services Procurement Regulations endeavors to limit this amount of subcontracting by requiring the prime contractor to agree that he will perform *not less than* 15 to 20 percent of the work with his own forces, thus allowing him to subcontract up to 80 or 85 percent of the work. (4 Gov't. Cont. Rep., par. 35,267.25) Using "his own forces" means, of course, that the prime contractor will himself hire laborers and contract with materialmen to perform his portion of the work. All such laborers and materialmen as well as the subcontractors are entitled to assert claims against the Miller Act payment bond which is only equal to either 40 or 50 percent of the amount of the prime contractor's contract with the government.

[12] The size of the total eventual claims against the payment bond

way he can protect his interest under the opinions below is to cease work and thus avoid the risk of losing further time or material.[13] Stoppage of work on government construction projects will plague the administration of these projects, increase their cost, and in certain instances, endanger our national security. The Eighth Circuit and the District Court are, in effect, telling Petitioner in this case as well as any other subcontractor that he should have stopped his work on a vital national defense project rather than foolishly continue to risk his own resources against the proceeds of a payment bond which were too meager to make him whole.

No such construction as the opinions below make of the Miller Act is warranted and this Court should review and settle this important question now.

Reason No. 2

The Opinions Below Raise Important Issues of Conflict With This Court's Decision in Pearlman.

A. The opinions below raise important and unsettled questions concerning the nature of the rights of laborers and materialmen announced in Pearlman.

In *Pearlman* this Court held that a surety who has paid laborers and materialmen on a government construction proj-

---

depends upon which other claims in addition to his go unpaid. This includes both current and future obligations to laborers and materialmen which the prime contractor has incurred or may incur during the remaining course of the work. The full extent of such claims cannot become known to any individual claimant until after the project is completed.

[13] It is submitted that this Court should view this conclusion as not being unnatural. As this Court remarked as to sureties in the case of United States v. Munsey Trust Co.:

> . . . [A] surety would rarely undertake to complete a job if it incurred the risk that by completing it might lose more than if it had allowed the government to proceed (to complete performance) (332 U. S. at 244)

This Court can hardly expect more nobler motives of working men than of paid sureties.

ect is entitled to recover monies paid by the government to the trustee in bankruptcy of the prime contractor. This Court cited the rule that:

> . . . a surety who pays the debt of another is entitled to all the rights of the person he paid to enforce his right to be reimbursed (371 U.S. at 137).

This Court then held that the surety who paid laborers and materialmen could recover by taking advantage of their rights, stating:

> We therefore hold in accord with the established legal principles stated above that the Government had a right to use the retained fund to pay laborers and materialmen; that the laborers and materialmen had a right to be paid out of the fund; that the contractor, had he completed his job and paid his laborers and materialmen, would have become entitled to the fund; and that the surety, having paid the laborers and materialmen, is entitled to the benefit of all these rights to the extent necessary to reimburse it (371 U.S. at 141).

Petitioner argued to the courts below that the rights of laborers and materialmen recognized by the above quotation from *Pearlman* were equitable rights of subrogation to the position of the government. Petitioner argued that these rights accrued to laborers and materialmen because they had performed the work and thereby discharged the prime contractor's performance obligation to the government. Since Petitioner, it was argued, is an unpaid laborer and materialman who performed work on the project, Petitioner is entitled to be subrogated to the government's rights against the performance bond.

The opinions below did not accept Petitioner's position even though it was supported by substantial authority.[14] The

---

[14] This Court in Pearlman prominently discussed and upheld its earlier decision in Prairie State which established the right of a surety performing the prime contractor's work to be equitably subrogated to the rights of the government as against the prime contractor.

District Court saw nothing in *Pearlman* which "indicated that the rights of the laborers and materialmen arose because they were subrogated to the rights of the United States" (A:13, 14). The Circuit Court held that "Congress has met any moral obligation to the providers of labor and material by providing the payment bond" (A:2). Both Courts refused to accept even the premise that Petitioner by performing the work discharged the performance obligation of the prime contractor to the government.[15]

The refusal by each court below to recognize the equitable subrogation rights of laborers and materialmen evidences the confusion over the nature of these rights which were enunciated by this Court in *Pearlman*. In the quotation from that case set forth above the Supreme Court simply stated that "laborers and materialmen" have a right to be paid out of the "fund" without defining that right as being either: (1) a right of equitable subrogation to the position of the government with respect to the fund or, (2) an equitable right or lien against the fund directly as a result of an equitable or

---

This Court in the Prairie State decision took pains to make the point that the surety was subrogated to the rights of the government as the creditor of the prime contractor rather than to the rights of the prime contractor, the debtor. To be subrogated to the rights of the prime contractor was, this Court pointed out, to be "subrogated to no rights whatever". (164 U. S. at 232) The concept of equitable subrogation to the rights of the government was not unique at the time of Prairie State nor should it be thought so today. See Annotation entitled "Right of surety who discharges obligation due to government to be subrogated to priority or preference of latter". 24 A.L.R. 1502 (supplemented at 32 A.L.R. 846) which cites, among other authorities, English decisions dating back to the year 1702 (*e.g.* Reg. v. Doughty cited at 1503 of 24 A.L.R.) which long before the revolution recognized the habit of the English Court of Exchequer to place a person who discharged an obligation due the Crown in the position of the Crown.

[15] The District Court simply stated "The subcontractor has not discharged the debt of another." (A:13). The Circuit Court curiously juxtaposed the United States as the debtor rather than the creditor of the debt discharged, stating: "Plaintiff has paid no debt that the United States is obligated to pay." (A:2).

moral obligation of the government to the laborer and materialmen. Of the two principal cases relied on by this Court in *Pearlman*, one supports the subrogation analysis of this right[16] while the other contains language which would support the direct equitable right or lien concept.[17] The lower court decisions cited by this Court in *Pearlman* also differed as to the rationale for laborers' and materialmens' rights.[18] Since

---

[16] The Prairie State case clearly follows only the theory of equitable subrogation. (*Supra*, n.14).

[17] The Henningsen case which involved the claim of a surety which had paid laborers and materialmen held that the surety was "entitled to assert the equitable doctrine of subrogation" (207 U. S. at 411) and strongly reiterated and quoted at length from Prairie State. However, Henningsen also stated that the surety, by paying the laborers and materialmen had "released *the government* from all equitable obligations to see that the laborers and supplymen were paid" (*Id.* at 410) (Emphasis supplied). There, therefore, arose from Henningsen the concept of an "equitable obligation" of the government to laborers and materialmen which was to plague this area of federal law up to the present date and which, it is submitted, should now be reviewed by this Court.

[18] Each of the three decisions of the Court of Claims cited by this Court in Pearlman (*supra*, n.23) as being "cases substantially like ours" utilized different explanations for allowing recovery. The case of Continental Casualty Co. v. United States, 169 F. Supp. 945 (1959) followed the rationale that the payment bond surety by discharging a debt of the prime contractor due the government (i.e. the prime contractor's obligation to pay laborers and materialmen), thereby became subrogated to the rights of the government as the creditor of that obligation. This rationale is regarded as correct in the scholarly note in 71 Yale L.J. 1274 *infra*. this footnote. However, this rationale is to be contrasted with the earlier Court of Claims decision in the case of Royal Indemnity Co. v. United States, 93 F. Supp. 891 (1950) which decided that the payment bond surety had discharged the "equitable obligation" of the government to "see" that laborers and materialmen were paid; and, further contrasted with the decision of the Court of Claims in National Surety Co. v. United States, 132 Ct. Cl. 724, 133 F. Supp. 381 (1955) which apparently followed both rationales. The confusion over these several theoretical rationales was discussed in the note entitled "Reconsideration of Subrogative Rights of the Miller

the conflict between the several possible sources of these rights was not resolved by *Pearlman*, it has persisted since *Pearlman*.[19]

As the opinions below evidence, it is vital that this Court now settle the question of the nature of the rights of laborers and materialmen on government projects described in the *Pearlman* decision. It is important that this Court now settle the question whether or not unpaid laborers and materialmen on government projects do have rights of subrogation to the position of the government.[20]

B. The opinions below conflict with the Pearlman decision in their limitation of that decision to cases brought by sureties against withheld funds.

The District Court below distinguished *Pearlman* as follows:

Act Payment Bond Surety" appearing in 71 Yale L.J. 1274 (1962) also cited by this Court in footnote 23 of the Pearlman decision.

[19] *Compare, e.g.*: Framingham Trust Co. v. Gould-National Batteries, Inc., 427 F. 2d 856 (1st Cir. 1970) (discussing the "equitable obligation" of the government to those who provide it with labor and materials) *with* Fireman's Fund Ins. Co. v. United States, 421 F.2d 706 (Ct. Cl. 1970) holding that a surety who pays laborers and materialmen is thereby discharging the obligation of the prime contractor *to the government* to pay them (citing Martin v. National Surety Company, 300 U.S. 588 (1937)) and is subrogated thereby to the rights of the government to the same extent as if it performed the work. Both Framingham and Fireman's Fund opinions cite this Court's decision in Pearlman.

[20] If this Court determines that the source of such rights is an equitable obligation of the government to "see" that laborers and materialmen are paid rather than a subrogation right, it is vital that this Court now determine the extent and meaning of such "equitable obligation". The government in this case as in similar cases has a perfectly good contract right which it could enforce so as to require the prime contractor and his surety to pay the laborer and materialmen. To deny the unpaid laborer and materialmen a right to be subrogated to the government's position is to leave the government as a "dog in the manger" after having accepted the labor and material.

> The Pearlman decision contained both the distinguishing factors already mentioned: (1) a surety was the one seeking relief, rather than a supplier of labor and material, and (2) a fund specifically withheld because of nonpayment of materialmen was sought, rather than, as here, a performance bond (A:13).

The Circuit Court below in its opinion pointed to the same two distinctions (A:2, 3). These are factual distinctions of no substance whatsoever.

While it cannot be denied that the combination of eager surety companies and withheld funds tends to produce litigation, there is nothing in the *Pearlman* case to indicate that the broad equitable doctrines enunciated by this Court should be limited to the benefit of surety companies seeking after withheld funds.[21] To do so would be to emasculate that holding and without reason confine its application to the favor of a narrow commercial interest. It makes as much sense to limit the application of the *Pearlman* decision to cases starting with the letter "P".

There is nothing in the historic equitable doctrine of subrogation which limits its application to paid sureties[22] or to withheld funds.[23] The argument that the doctrine only applies to retainages has been rejected by other federal courts.[24] This Court in the *Prairie State* case did not so limit the rights of an equitable subrogee but held he had a "right to resort to the *securities and remedies* which the creditor, the United

---

[21] The Miller Act was not intended to favor sureties, *supra*, footnote 6.

[22] The doctrine is not uncommonly applied to construction work without the ubiquitous surety being present. See e.g., United States v. Raley Contracting Company, 210 F. Supp. 54 (N.D. Miss. 1962) and Mestayer Lumber Company, Inc. v. Cusock, 141 So. 2d 166 (La. App. 1962).

[23] This Court in Pearlman did not moot the case because the funds had actually been paid over to the trustee in bankruptcy of the prime contractor.

[24] *See* Argonaut Insurance Company v. United States, 434 F. 2d 1362 (Ct. Cl. 1970) and cases cited therein.

States, was capable of asserting against its debtor" (Emphasis added) (164 U. S. at 232). The right to the fund retained by the government was characterized as "one of such remedies" (Emphasis added) (*Id.* at 232). In its review of the *Prairie State* opinion, this Court in *Pearlman* approved the same broad reference of the right to be subrogated to the securities and remedies of the United States.[25] One of the principal "securities and remedies" of the United States is obviously Respondents' performance bond sued on herein.

Since the doctrine of equitable subrogation is founded upon the concept of unjust enrichment[26], how can it be less applicable to this case than to cases involving sureties and withheld funds? If the opinions of the Courts below are allowed to stand, Respondents are being unjustly enriched at Petitioner's expense since Petitioner discharged a large portion of Respondents' performance obligation to the government without compensation. Respondents were saved a claim against their performance bond to the extent of Petitioner's performance—yet, if the opinions below stand, they do not have to pay Petitioner for this. Would the equity of Petitioner's case be greater if it were a surety company or if the government had happened to withhold a cache of money from the prime contractor?

It is submitted that this Court should now settle the serious questions raised by the lower courts concerning the meaning of the *Pearlman* case.

---

[25] In Pearlman this Court discussed the Prairie State holding as follows:

> "The Court, in a well-reasoned opinion by Mr. Justice White, held that this fund materially tended to protect the surety, that its creation raised an equity in the surety's favor, that the United States was entitled to protect itself out of the fund, and that the surety, by asserting the right of subrogation, could protect itself by resort to the *same securities and same remedies* which had been available to the United States for its protection against the contractor." (371 U. S. at 137, 138) (Emphasis added)

[26] Section 162 of the Restatement of the Law of Restitution.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eight Circuit Court of Appeals.

Respectfully submitted,

RICHARD W. SMITH,
ALLEN L. OVERCASH
Woods, Aitken, Smith, Greer,
Overcash and Spangler
1241 N Street
Lincoln, Nebraska 68508

Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 20,544.

United States of America for the Use and Benefit of James E. Simon Co., Inc., and James E. Simon Co., Inc., Appellants,

v.

Ardelt-Horn Construction Co. and St. Paul Fire & Marine Insurance Company, Appellees.

Appeal from the United States District Court for the District of Nebraska.

[August 17, 1971]

Before Van Oosterhout, Heaney and Ross, Circuit Judges.

Per Curiam.

This is a timely appeal by plaintiff James E. Simon Co., Inc., a subcontractor on a government building project covered by the Miller Act from final order dismissing with prejudice its third claim for relief, which is based upon a Miller Act performance bond. Rule 54(b) determinations for entry

of final judgment on the third claim were made by the trial court. Rulings upon other claims for relief are not involved on this appeal.

Judge Urbom, in a well-reasoned opinion reported at 316 F.Supp. 254, fairly sets out the facts, the issues, the controlling law and the basis for his decision dismissing the claim. The primary issue presented is whether a subcontractor who has furnished and paid for labor and material upon a government construction contract covered by the Miller Act is entitled to recover on the performance bond the cost of such labor and material which has not been paid to him.

Plaintiff bases its right to recover on the performance bond upon the theory that it is a third party beneficiary, and upon the theory of equitable subrogation to the rights of the government on the performance bond. We affirm the dismissal of the third claim for relief upon the basis of the trial court's well considered opinion.

We agree with the view of the trial court that the Miller Act by its clear language, which is fully supported by the legislative history, provides for a payment bond for protection of those providing labor and material on government projects and a performance bond for the protection of the United States, and that no basis exists for plaintiff's claim as a third party beneficiary of the performance bond.

We are also satisfied that the plaintiff has failed to establish that it is equitably subrogated to the rights of the United States to enforce the performance bond. Plaintiff has paid no debt that the United States is obligated to pay. Congress has met any moral obligation to the providers of labor and material by providing the payment bond. A payment bond of $206,502.50 has been provided as required by the Miller Act.

As pointed out by Judge Urbom, *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132, and other cases cited by the plaintiff dealing with the right of a surety satisfying the obligation of the subcontractor to be subrogated to rights of the prime

contractor to funds withheld by the government with respect to which the government makes no conflicting claim, falls far short of supporting the view that a subcontractor paying for labor and material on a government project is subrogated to the rights of the government on the performance bond. See *Sun Insurance Co. of New York v. Diversified Engineers, Inc.*, D.C.Mont., 240 F.Supp. 606.

In our present case, plaintiff does not assert any right based upon funds withheld by the government from the prime contractor and hence we do not have before us the issue of plaintiff's right to funds, if any, withheld from the prime contractor by the government.

The judgment of dismissal is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

JUDGMENT

This Cause came on to be heard on the record from the United States District Court for the District of Nebraska and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of dismissal of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 17, 1971

APPENDIX B

MEMORANDUM

Filed August 4, 1970

James E. Simon Co., Inc., individually and as use plaintiff, brings this action for recovery of unpaid amounts claimed to be due it as a subcontractor which furnished labor and materials for a project on which the defendant Ardelt-Horn Construction Co. was the general contractor and the United States of America was the owner. The defendant St. Paul Fire & Marine Insurance Company was the surety on a payment bond and on a performance bond required by the Miller Act, 40 U.S.C. § 270a. Three claims are asserted: (1) against the general contractor by the subcontractor individually, (2) against the general contractor and the surety on the payment bond by the subcontractor as use plaintiff, and (3) against the general contractor and the surety on the performance bond by the subcontractor as use plaintiff.

The general contractor has filed a motion to dismiss the complaint and the surety has filed a motion to dismiss the second and third claims and to strike the second claim.

I. FIRST CLAIM FOR RELIEF

The complaint alleges that the general contractor entered into a contract with the United States for the construction of certain bituminous pavement and railroad track at the Cornhusker Army Ammo Plant near Grand Island, Nebraska, and that the general contractor thereafter made written and oral subcontracts with the subcontractor for the performing of certain labor and the furnishing of certain material for such project; that the subcontractor performed requirements of the subcontracts; and that the general contractor has not paid the subcontractor.

The subcontractor, James E. Simon Co., Inc., is alleged to be a corporation organized under the laws of Nebraska with its principal place of business in North Plattte, Nebraska. The

general contractor, Ardelt-Horn Construction Co., is alleged to be a corporation organized under the laws of Colorado with its principal place of business in Colorado. The amount prayed for far exceeds the $10,000.00 diversity jurisdiction requirement.

Contention is made that the Miller Act provides a subcontractor's exclusive remedy. Tit. 40 § 270b states:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him . . .
>
> "(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

This language does not convey a declaration of exclusion of other remedies against the general contractor. While it may be that any suit on a bond furnished in accordance with the Miller Act must meet all the requirements of § 270b, no case has been found by this court that holds that an action against the general contractor because of breach of a subcontract or due under a subcontract would not lie. The general contractor in its brief asserts that the subcontractor has the option of suing the contractor for breach of contract or of making claim under provisions of the Miller Act, but cannot do both.

Cited to support that proposition are *Gichner v. Insurance Companies of North America,* 180 Atl. 2d 842 (M.C. App. 1962); *United States for use and on behalf of B. Katchen Iron Works, Inc. v. Standard Accident Insurance Co.,* 158 F. Supp. 616 (U.S.D.C. N.J. 1958), aff'd 257 F. 2d 78 (C.A. 3rd Cir. 1958); *United States for use and benefit of Noland Company v. Skinner & Ruddock,* 164 F. Supp. 616 (U.S.D.C. E.D. S.C. 1958); and *United States for use of Susi Contracting Company v. Zara Contracting Co., Inc.,* 146 F. 2d 606 (C.A. 2d Cir. 1944) which hold only that when an action is filed on a payment bond furnished under the Miller Act the requirements of the Miller Act regarding the time and manner of filing a claim must be followed, and *Schwasnick v. Blandin,* 65 F. 2d 354 (C.A. 2nd Cir. 1933); *Knotts v. Clark Const. Co.,* 249 F. 181 (C.A. 7th Cir. 1918); *St. Paul-Mercury Indemnity Company v. United States,* 238 F. 2d 917 (C.A. 10th Cir. 1956); *Southern Painting Company of Tennessee v. The United States for the use of Silver,* 222 F. 2d 431 (C.A. 10th Cir. 1955); and *Continental Casualty Company v. Schaefer,* 173 F. 2d 5 (C.A. 9th Cir. 1949), which permit, but none requires, the subcontractor to waive the breach of contract and sue in quantum meruit. None of these cases suggests that either suit for breach of contract or suit in quantum meruit results in loss of rights on a surety bond.

The plaintiff is entitled to pursue his cause of action against the general contractor on the subcontract or because of breach of the subcontract at the same time that he relies upon his remedies on the payment bond.

Jurisdiction is conferred by 28 U.S.C. § 1332 and the first claim for relief states facts upon which relief may be granted.

The motion of the defendant Ardelt-Horn Construction Co. to dismiss, including the assertion of lack of jurisdiction, as it relates to the first claim, will be denied.

II. SECOND CLAIM FOR RELIEF

This claim seeks to recover on the payment bond furnished by the general contractor, which was provided by the general

contractor to assure payment for those who furnished labor and material for the project. The only point made in the motions to dismiss and to strike is that exactly the same claim is asserted in another action now pending in this court, Civ. 1461 L. In that action a different subcontractor, as use plaintiff, sued the general contractor and the surety. James E. Simon Co., Inc. thereafter was interpleaded and filed its claim in interpleader against the surety and in its cross-claim against the general contractor. In that claim in interpleader and cross-claim James E. Simon Co., Inc. alleges the same facts that it alleges in the second claim for relief in the present action and asks for the same relief.

The only reason assigned by James E. Simon Co., Inc. for the filing of the second claim for relief in this action was by way of oral argument when its counsel suggested that he wanted to be certain that "all the i's were dotted and t's were crossed" and that since the Miller Act speaks of "suit instituted," he wished to preclude any argument that appearance as an interpleaded defendant in Civ. 1461 L was not the institution of a suit. The surety in its brief has stated that it will not assert and does waive any defense to the effect that James E. Simon Co., Inc. has not "instituted" suit by appearing as an interpleaded defendant in Civ. 1461 L.

Under the circumstances, this court sees no valid reason for permitting two actions to proceed simultaneously in the same court on the same claim. The motion of Ardelt-Horn Construction Co. to dismiss the complaint and the motion of St. Paul Fire & Marine Insurance Company to dismiss and to strike will be sustained insofar as they relate to the second claim for relief, but the dismissal will be without prejudice.

III. THIRD CLAIM FOR RELIEF

The issue presented is whether a subcontractor who has furnished labor and material is entitled to recover on a bond assuring the performance of a prime contractor where the surety has also provided a bond for the payment of suppliers of labor and material, as required by the Miller Act. Only two cases have been found which directly answer the ques-

tion. *United States v. Kalady Construction Company*, 227 F. Supp. 1017 (U.S.D.C. N.D. Ill. E.D. 1964) answers in the affirmative, and *Sun Insurance Co. of New York v. Diversified Engineers, Inc.*, 240 F. Supp. 606 (U.S.D.C. Mont. 1965) answers in the negative.

The obligations of the surety and the principal, the general contractor, and the rights of the subcontractor must be determined by the contractual provisions of the performance bond and, because the bond refers to it, the contract between the general contractor and the United States. Hereinafter, reference to "the contract" means only the agreement between the general contractor and the United States. As the Miller Act was the mandatory authority for issuance of the performance bond as well as the payment bond, the Act and its legislative history may assist in learning the intent of the contracting parties to the performance bond.

The pivotal issue is whether the United States, the general contractor, and the surety intended that a supplier of labor and material under a subcontract be a beneficiary of the performance bond.

A copy of the performance bond, attached to the complaint, shows that the condition of the obligation of the surety and the principal was that "the Principal shall perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract . . ."

A copy of the contract is not before the court. In its brief the subcontractor sets out provisions which it says and the surety in its brief agrees are contained in the contract.[1] In

---

[1] "1. *COMMENCEMENT, PROSECUTION AND COMPLETION OF WORK.* The Contractor shal commence work under this contract within ten (10) calendar days after the date of receipt by him of Notice to Proceed, prosecute said work diligently and complete the entire work ready for use not later than the number of calendar days after receipt of Notice to Proceed as set out in Completion Schedule below. The time stated for completion shall include final cleanup of the premises.

"26. *PAYMENT.* Payment for the various items listed in the Bidding Schedule shall constitute full compensation for furnishing all plant, labor, equipment, appliances and materials and for

essence, they: require the prime contractor to "prosecute the

---

performing all operations required to complete the work in conformity with the drawings and specifications. All costs in connection with work not specifically mentioned in the Bidding Schedule shall be included in the contract prices for the items listed.

"7. *PAYMENTS TO CONTRACTOR*

"(a) The Government will pay the contract price as hereinafter provided.

"(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

"(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

"(d) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

"(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government, arising by virtue

work diligently and complete the entire work"; state that payment of the items listed on the Bidding Schedule shall be full compensation "for furnishing all plant, labor, equipment, appliances and materials and for performing all operations"; require the government to pay the contract price, including progress payments based upon the portion of the contract price included for each principal category of work; permit the taking into consideration in the making of progress payments the material delivered to the site, as well as material delivered elsewhere under certain circumstances; authorize the withholding of a percentage of the contract price until completion; provide that all material and work covered by the progress payments made "shall thereupon become the sole property of the Government"; and require final payment upon presentation of releases "of all claims against the Government acquired by virtue of this contract."

It may be assumed also that the contract required the general contractor to furnish a payment bond assuring the payment by the general contractor of materialmen and a performance bond guaranteeing compliance by the general contractor of the provisions of the contract.

Nothing in these provisions of the contract gives any clear hint at an intent that the materialmen would have rights under a performance bond.

The subcontractor argues that the contract contemplated that the general contractor "will furnish" labor and material and that such a contemplation carried with it an obligation on the part of the general contractor to pay for such labor and material actually furnished by a subcontractor and that failure to pay therefor constituted a failure to perform "all the undertakings, covenants, terms, conditions, and agreements of this contract," thereby triggering liability on the performance bond.

---

of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended, (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required by the assignee."

Principally relied upon are *American Casualty Co. of Reading Pa. v. Brezina Construction Co.*, 295 F. 2d 603 (C.A. 8th Cir. 1961); *Continental Casualty Company v. United States*, 169 F. Supp. 945 (Ct. Cls. 1959); *Pearlman v. Reliance Insurance Co.*, 371 U.S. 132 (1962); and *United States v. Kalady Construction Company*, 227 F. Supp. 1017 (U.S.D.C. N.D. Ill. E.D. 1964).

The *Brezina* case, which did not construe a Miller Act bond, held that an agreement by a subcontractor to furnish materials carries with it an agreement to pay the suppliers of those materials and that the surety on the contractor's performance bond must pay the prime contractor the amount which the prime contractor had to pay the suppliers of the materilals which the subcontractor failed to pay. The court distinguished earlier Eighth Circuit cases of *United States for Use of W. B. Young Supply Co. v. Stewart*, 288 F. 187 (1923), cert. denied 263 U.S. 699, 44 S. Ct. 5, and *Babcock & Wilcox v. American Surety Co.*, 236 F. 340 (1916), which had held that an agreement to furnish was not the equivalent of an agreement to pay. The court in the *Brezina* case was careful not to overrule those earlier decisions, but rather distinguished them by observing that each of the earlier actions was brought by the materialman or on his behalf, not by the obligee of the bond. The court in the *Brezina* case further said:

> "The Court [Judge Parker speaking in Saint Paul Mercury Indemnity Co. v. Wright Contracting Co., 250 F. 2d 758, C.A. 4th Cir. 1958] also made the pertinent observation that the situation would be different if the person in whose favor the bond runs is under no obligation to pay for the supplies and material furnished and lien therefor cannot be obtained on the property to his detriment, and made this pronouncement:
>
> 'Where, as here, the prime contractor is bound to pay for materials used on the project, whether furnished by himself or a subcontractor, failure of a subcontractor to pay for materials furnished him is in precisely the same category as failure of a contractor to pay for labor or materials giving rise to a laborers' or materialmen's lien; and it is generally held that loss resulting from such failure and

> the assertion of such a lien is covered by a performance bond, whether or not payment for labor or materials is expressly required by the bond or contract.' "

In the present case the wider construction of "furnish" is required on neither score. The present action is for the materialman, not for or by the obligee, the United States, and the United States would not be liable to the materialman,[2] both factors being contrary to the situation in *Brezina*.

Continental Casualty Company v. United States, supra, was an action by a surety which had paid laborers and materialmen who had not been paid by the general contractor on projects owned by the United States. The surety sought recovery of funds which had been withheld by the United States. The court held that the surety by paying was satisfying two obligations of the contractor: one to the laborers and materialmen who were general creditors; the other to the United States, which was a preferred creditor "because of its possession of funds which could be used as an offset against the contractor. By satisfying the latter obligation, the plaintiff surety became entitled to be subrogated to the security which the United States held, i.e., the funds in its hands." The problem in the *Continental Casualty Company* case was in determining the priorities of the claim of the surety and the claims of the other creditors of the general contractor. That case did not involve a claim that a subcontractor was entitled to recover on the general contractor's performance bond. The court explicitly granted the surety priority on the theory that by satisfying an obligation of the general contractor to the United States, the surety was subrogated to the rights of the United States to the withheld funds in the possession of the United States. It nowhere suggested that the *subcontractor* was subrogated to the rights of the United States to those withheld funds.

Nor did *Pearlman v. Reliance Insurance Co.*, supra, so declare. That case held that the materialman or subcontractor

---

[2] *United States v. Munsey Trust Co.*, 332 U.S. 234 (1947).

was entitled to funds withheld from the general contractor because of the general contractor's failure to pay the subcontractor, but did not say that that result was because the subcontractor was subrogated to the rights of the United States.

The present case does not involve a claim to withheld funds. This difference is significant because withheld funds are peculiarly related to the failure of the general contractor to pay the subcontractor; a performance bond, on the other hand, is not so directly related to that failure. The withheld fund is created because of the failure; the performance bond existed before the failure and its wording gives no impression that it was given in contemplation of a possible failure to pay suppliers. The principle of the *Continental Casualty Company* case and the *Pearlman* case does not become activated with respect to a performance bond. Additionally, the claim in the present case is not by a surety, but by a subcontractor. This fact is of importance, as pointed out in *Brezina*. The doctrine of subrogation involves the use of the property of one person to discharge the debt of another.[3] The subcontractor has not discharged the debt of another. At most it has discharged its own obligation to the general contractor. It, as a creditor of the general contractor, does not thereby become subrogated to rights of another creditor, the United States, merely because the obligation of the general contractor may run in two directions—to the subcontractor and to the United States. The plaintiff has cited no case and the court has found none holding to the contrary, unless the *Kalady* case be so interpreted.

The *Pearlman* decision contained both the distinguishing factors already mentioned: (1) a surety was the one seeking relief, rather than a supplier of labor and material, and (2) a fund specifically withheld because of nonpayment of materialmen was sought, rather than, as here, a performance bond. While the court in *Pearlman* said that "the laborers and materialmen had a right to be paid out of the fund," nothing in the opinion indicated that the rights of the laborers and materialmen arose because they were subrogated

---

[3] *Restatement of the Law of Security*, § 141, p. 383.

to the rights of the United States to the withheld funds and, of course, did not declare that the laborers and materialmen were entitled, by subrogation or otherwise, to other rights of the United States, such as benefits under a performance bond.

Rather than analyzing the present case in terms of subrogation, it seems more appropriate to analyze it in the terms of a third-party beneficiary contract, whereby the central issue becomes, as earlier stated, whether it was intended by the parties to the performance bond that the subcontractor was to benefit from it.

The *Restatement of the Law of Security*, § 166, p. 461, states:

> "Where a surety guarantees the performance of a contract by a contractor who does not promise the owner to pay those furnishing labor or materials but agrees to complete the work free of liens or to furnish labor and materials, laborers and materialmen have no rights against the surety."

The rationale of the rule is stated in terms of intent, as follows:

> ". . . (I)f the surety has only guaranteed the contractor's promise to complete a construction project free of liens or to furnish labor and materials, there is no right in laborers or materialmen because there is no indicated purpose to benefit them. . . . If the surety is to be made liable to third persons his obligation must contain a promise which may be reasonably interpreted as for their benefit."

The Nebraska Annotation to the *Restatement of the Law of Security*, § 166, suggests that early Nebraska cases, appearing to be contra, were rested on a public policy to protect laborers and materialmen in view of the lack of attachment of liens to public structures. I doubt the applicability of these early Nebraska cases to Miller Act cases, because it would seem preferable to apply federal law to federally required provisions of contracts,[4] and because the public policy sought has been pro-

---

[4] An excellent discussion of the applicability of state law in interpreting Miller Act cases by Richard W. Smith, one of the counsel in

tected by other means under the Miller Act, as hereinafter discussed.

As I interpret the *Brezina* case, the Eighth Circuit Court of Appeals stands by the rule set out in the *Restatement*, as hereinbefore quoted, but creates an exception in those instances in which the general contractor—or, by extension, the owner in construction contracts like the present one—is liable for labor and material furnished by another. That exception is not applicable in the present case because the United States is not liable for payment to the subcontractor. It also must be kept in mind that no payment bond for the protection of the suppliers of labor and material had been given in the *Brezina* case, so a need for finding other protection for them was greater than where, as here, a payment bond exists. The desirable public policy of protecting laborers and materialmen who are not protected by a lien or a duty on the part of the owner to pay was directly considered and amply achieved by Congress in the passage of the Miller Act. In *United States v. Munsey Trust Co.*, 332 U.S. 234, 241 (1947), the court said:

> ". . . But nothing is more clear than that laborers and materialmen do not have enforceable rights against the United States for their conpensation. . . . They cannot acquire a lien on public buildings . . ., and as a substitute for that more customary protection, the various statutes were passed which require that a surety guarantee their payment. Of these, the last and the one now in force is the Miller Act . . ."

The Miller Act by § 270a(a) requires that on any contract for public work of the United States the contractor must furnish to the United States:

---

the present case, appears in the *Proceedings, 1963 Section of Insurance, Negligence and Compensation Law* of the American Bar Association, p. 83. The conclusion is that the Supreme Court of the United States in the *Pearlman* decision was "reaching, in spite of *Erie R.R. v. Tompkins* for a federal general common law *applicable in those areas* where uniformity of decisional substantive law appears to be desirable . . ."

> "(1) A performance bond . . . for the protection of the United States . . .
>
> "(2) A payment bond . . . for the protection of all persons supplying labor and material in the prosecution of the work . . ."

By § 270b every person who has furnished labor or materials in the prosecution of the work is given the right to sue on such payment bond. Nothing in the wording of the act gives to the one who furnished labor or material any right to sue on the performance bond. If Congress had intended *both* bonds to be for the protection of persons supplying labor and material, it easily could have said so.

I am persuaded that the conclusion now reached, which is that a subcontractor who furnishes labor and material is not entitled to recover on a Miller Act performance bond, is not at odds with the intent of Congress in passing the Miller Act. Contrary to the suggestion in the plaintiff's brief and stated by the court in *United States v. Kalady Construction Company*, supra, limiting such subcontractors to recovery on the payment bond does not make the " 'two-halves'—the two bonds—less than the whole bond it had been under the Heard Act." Two reasons are compelling:

First, the Heard Act[5] did not provide any minimum for the amount of the bond, requiring only that it be "the usual penal bond" with good and sufficient sureties, with the additional obligation that "such contractor . . . shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work . . ." and stated, "(I)f the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claim and demands [of persons supplying labor and materials], then, after paying the full amount due the United States, the remainder shall be distributed pro rata among [the persons who supplied labor and materials]." The Miller Act requires a perform-

---

[5] Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by Act of February 24, 1905, c. 778, 33 Stat. 811, 40 U.S.C. § 270.

ance bond in such amount as the officer awarding the contract shall deem adequate and a payment bond in the sum of one-half the total amount payable by the terms of the contract, where the amount payable is not more than $1,000,000.00.[6] Furthermore, the Miller Act provides that it shall not be construed to limit the authority of the contracting officer to require other security in addition to those specifically mentioned. The total amount of the two bonds required under the Miller Act may exceed, therefore, the amount of the single bond required under the Heard Act. Beyond this, the Heard Act specifically limited the suppliers of labor and material to whatever remained after the United States was satisfied in full. The Miller Act, on the other hand, gives to the suppliers of the labor and materials the full amount of the payment bond, which will amount to at least one-half the full contract price, and more if the contracting officer requires further security for them. The amount actually recoverable under the payment bond may well be in excess of the amount recoverable by the suppliers of labor and materials under the one bond required by the Heard Act.

Second, the Heard Act gave the suppliers of labor and material no right to initiate suit on the bond until six months from the completion and final settlement of the contract except that they could intervene in any action instituted by the United States on the bond. The Miller Act permits the suppliers of labor and material to sue on the payment bond 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him, thus accelerating substantially the time in which he could enforce his rights under the bond.

The legislative history of the Miller Act reflects that the purpose was to reduce delay in enforcement of the subcontractors' rights. The report of the House of Representatives Com-

---

[6] Although the full contract is not before the court, it appears from the briefs that probably the amount payable under the full contract in the present case is not more than $1,000,000.00.

mittee on the Judiciary of June 19, 1935,[7] states:

> ". . . After considerable complaint with regard to the working of the Heard Act had come to the Committee on the Judiciary, particularly from subcontractors who have experienced in many cases what seems to your committee to be undue delay, with resultant hardships, in the collection of moneys due them by suits on bonds under the procedure prescribed by the Heard Act, the committee appointed a subcommittee to consider all of a number of proposed amendments . . .
>
> "The Treasury Department expressed its accord with the purpose sought to be accomplished, in the following language . . .:
>
> 'The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law.' "

Acceleration of right of action is not a hollow procedural change. Receiving payment swiftly has distinct economic benefits of which Congress was well aware.

In footnote 9 of the opinion in *MacEvoy Co. v. United States*, 322 U.S. 102, 109 (1944) the court recites the following legislative history:

> "Rep. Miller stated in the House that 'This bill merely provides that in the construction of public buildings and other public works there shall be two bonds, one for the performance of the contract with the Government, and the other a payment bond for the protection of subcontractors and those furnishing the labor and material. Under the present law we have but one bond, with a dual obligation, but it is not satisfactory in that it does not afford protection to the subcontractors, materialmen, and laborers. This merely provides for two bonds, one for the protection of

---

[7] H. Rep. No. 1263 (74th Cong., 1st Sess.), p. 1.

> the Government's interests, and the other for the protection of the rights of labor, the subcontractors, and material furnishers.' "

If Representative Miller meant that the act provides for *two* bonds for the protection of the rights of labor, the subcontractors, and material furnishers, *one* of which is to be also for the protection of the government, he could hardly have selected less appropriate language than he did for the expression of that intent. Moreover, it is difficult to believe that the framers of the Miller Act would give to the suppliers of labor and materials rights on the performance bond without mentioning the subject of priorities between those suppliers and the United States, a subject so specifically covered by the wording of the Heard Act.

Neither the Miller Act nor the history of its passage mirrors an intent that suppliers of labor and material should have rights under the performance bond. In order to hold that the parties to the performance bond and the contract referred to in it intended that the suppliers of labor and material were to be beneficiaries of the performance bond, a clearer expression of it should exist than appears in the documents here involved.

Accordingly, the motion of Ardelt-Horn Construction Co. to dismiss the complaint and the motion of St. Paul Fire & Marine Insurance Company to dismiss and to strike will be sustained as to the third claim for relief.

A separate order will be entered in accordance with this opinion.

Dated August 4, 1970.

BY THE COURT

Warren K. Urbom
United States District Judge

ORDER

Filed August 4, 1970

Civ. 1527 L

For the reasons stated in the accompanying memorandum,

IT HEREBY IS ORDERED

1. That the motion of the defendant Ardelt-Horn Construction Co. to dismiss the complaint or to quash the summons (filing No. 4) is sustained insofar as it requests dismissal of the second and third claims for relief and is overruled in all other respects.

2. That the motions of the defendant St. Paul Fire & Marine Insurance Company to dismiss and to strike (filing No. 5) the second and third claims for relief are sustained.

3. That the plaintiff's second claim for relief is dismissed without prejudice and is stricken.

4. That the plaintiff's third claim for relief is dismissed with prejudice.

Dated August 4, 1970.

BY THE COURT

Warren K. Urbom
United States District Judge

SUPPLEMENTAL ORDER—FINAL JUDGMENT AS TO PLAINTIFF'S THIRD CLAIM FOR RELIEF

Filed August 26, 1970

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedures, 28 U.S.C. this Court expressly determines that there is no just reason for delay and expressly directs the entry of

the final judgment as to plaintiff's third claim for relief according to this Court's order of August 4, 1970, which provided in paragraph 4 thereof that the plaintiff's third claim for relief is dismissed with prejudice.

Dated August 25, 1970.

BY THE COURT

Warren K. Urbom
United States District Judge

APPENDIX C

THE MILLER ACT

40 U.S.C. § 270a

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000 the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance

bond or other security in addition tc those, or in cases other than the cases specified in subsection (a) of this section.

(d) Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be given more than one hundred and eighty days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1954. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

40 U.S.C. § 270b

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however*, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of

the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

40 U.S.C. § 270c

The Comptroller General is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents execution, and delivery of the original. Applicants shall pay for such certified copies such fees as the Comptroller General fixes to cover the cost of preparation thereof.

40 U.S.C. § 270d

The term "person" and the masculine pronoun as used in sections 270a-270c of this title shall include all persons whether individuals, associations, copartnerships, or corporations.

40 U.S.C. § 270e

The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of the Treasury may waive sections 270a-270d of this title, with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the United States and with respect to contracts for the manufacturing, producing, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, munitions, materiel, or supplies of any kind or nature for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of such contracts as to payment or title.